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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 803 73

KARL FELLER, *Petitioner*,

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Karl Feller, a citizen of the United States and of the State of Pennsylvania, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above cause January 30, 1953, affirming the judgment of the United States District Court for the Western District of Pennsylvania.

OPINIONS BELOW

The opinion of the District Court is reported at 106 F. Supp. 147 and appears in the appendix for appellant at 229a-250a (PA 229a-250a).[1]

[1] In referring to the printed record, the printed appendix of the appellant below (petitioner here) appearing in Vol. I will be designated "PA". In Vol. II, the printed appendix of appellee below (respondent here) will be designated "RA", and new matter will be designated "R.—"

The opinion of the Appellate Court affirming the judgment of the District Court is reported at 201 F. 2d 670, and appears in the record here at page 138, Vol. II.

JURISDICTION

Judgment of the Court of Appeals sought to be reviewed was entered January 30, 1953 (R. 140). Petition for Rehearing was timely filed February 12, 1953 (R. 141) and denied by order entered February 19, 1953 (R. 150). The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's right to appeal has been nullified by failure of the Court of Appeals to review, consider and determine questions of law presented on appeal.

2. Whether a defendant is precluded from presenting defenses of conspiracy, illegality, and resulting trust on trial when the same have not been affirmatively pleaded.

3. Whether an American citizen's property may be seized and held on the strength of memoranda from the files of German organizations and documents interchanged between German corporations and German government agencies with respect to which there was no knowledge or proof of knowledge shown on the part of such citizen and no independent proof of conspiracy between him and the German entities.

4. Whether, when the uncontradicted evidence showed denial by petitioner, as the recipient of funds, of any assent to apply such funds to the use and benefit of the provider, a resulting trust could be implied without direct evidence of such assent.

5. Whether an "innocuous" agreement in 1937 for lawful business purposes, at a time when there was no war or thought of war, can justify a seizure of property under the Trading with the Enemy Act.

6. Whether as a matter of law petitioner was deprived of his right to a fair trial *de novo* by the admission of evidence from prior administrative hearings when no foundation had been laid and no direct evidence concerning the subject matter of such prior testimony had been tendered.

7. Whether unimpeached and uncontradicted testimony of an adverse party may be wholly disregarded by the trial court on matters competent and relevant to the issue on trial.

8. Whether the rules of principal and agent properly can be applied to defeat petitioner's application for return of the subject matter of this suit.

STATEMENT OF THE MATTER INVOLVED

Petitioner sued the Attorney General of the United States, as successor in office to the Alien Property Custodian, in the United States District Court for the Western District of Pennsylvania under Section 9(a) of the Trading with the Enemy Act. (40 Stat. 411, 50 U.S.C. App. Sec. 1 et seq.) The purpose of the suit was to recover all issued and outstanding shares of the capital stock of Schloemann Engineering Corporation, a Delaware corporation. These shares had been seized by the Alien Property Custodian by Vesting Order No. 2953, dated January 15, 1944. (PA 4a-7a).

The complaint was filed April 29, 1949 (PA 1a). It charged that the shares aforesaid, standing in petitioner's name and owned by him absolutely, had been taken from him upon a false finding by the Alien Property Custodian that they were owned by a German Corporation, Schloemann A. G.[2] (PA 5a, 6a)

---

[2] The full title of the German Corporation was Schloemann Aktiengesellschaft. It was referred to in the record as Schloemann A.G.; S.A.G., and sometimes as "the German corporation". Here we will use the term "Schloemann A.G."

The answer, filed February 10, 1950, by the Attorney General, successor in office to the Alien Property Custodian, denied generally (1) petitioner's ownership and (2) a taking based upon a false finding. (PA 9a, 10a)

Upon this state of pleading, the case went to trial.

During the course of the trial a number of questions of law arose upon which, after timely objection, rulings adverse to petitioner were made. The trial judge in his opinion referred to certain of these rulings and passed judgment thereon; upon others, no comment was ever made. These adverse rulings of the trial judge, as well as his enunciation and application of principles of law, were made the subject of petitioner's appeal.

The errors committed go to the very heart of your petitioner's case. We here summarize the background out of which the questions on appeal arose.

I

At the close of plaintiff's case, no question of its legal sufficiency was raised by respondent, who proceeded to defend on the asserted grounds that "*plaintiff had agreed* to hold the stock on a secret trust for the German corporation (Schloemann A.G.); that *the agreement* was a conspiracy to conceal the real ownership of the stock; that *the parties* to that conspiracy were Schloemann A.G.; the plaintiff here, and the German government." (PA 11a) (Emphasis supplied)

Plaintiff below objected to such defense under the general denial of the answer, contending Federal Rules of Civil Procedure 8(c) and 12(h) required such defense matters to be set forth affirmatively or they would be deemed to have been waived. (PA 11a, 12a, 57a-65a)

Respondent sought to overcome the objection by declaring "we are not setting up conspiracy as a defense" but "as a rule of evidence, so that we can put in evidence of one party to the agreement against another. That is all.

The fact that there was a conspiracy is not in itself a defense or material except from the evidentiary point of view." (PA 13a)

The Court below overruled plaintiff's objection saying, "I take it this evidence they [the defense] offer is legal although I may be wrong; and I will overrule the objection and grant you an exception." (PA 65a)

This ruling became one of the principal questions of law on appeal. (Question III, Petition for Rehearing, R. 143;)[3]

II

Defendant called the plaintiff as an adverse party under Rule 43(b), Federal Rules of Civil Procedure, and interrogated him as to statements made by him at prior administrative hearings, the method being to read from the transcript of the administrative hearing and ask if what was read was the testimony previously given. To such procedure objection was made on the ground that the instant trial was *de novo* and that while the rule permitted contradiction or impeachment of the witness, such contradiction or impeachment must be related to testimony or evidence then and there given at the District Court trial. (PA 44a-48a)

The Court below overruled the objection and permitted the prior testimony to be read into the record as purported admissions and evasions, although no attempt was ever made to develop, by immediate and direct testimony at the trial in the District Court, the subject matter involved in the prior administrative hearings. (PA 45a-49a)

This objection and the ruling of the Court admitting such testimony became another question of law presented by this

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[3] Question III was: "May a court properly admit evidence concerning conspiracy and illegality, including memoranda from the files of German organizations, and letters interchanged by German corporations, trade groups and government agencies, when the defenses of conspiracy and illegality were not affirmatively pleaded and no scienter or consent of plaintiff was shown?"

petitioner to the appellate Court for decision. (See Question IV, Petition for Rehearing, R. 144.)[4]

III

When the defense offered letters, memoranda and documents discovered after World War II by government agents in the files of Schloemann A.G. and the German Government (or interchanged between them and other German firms) to prove a claimed but unpleaded conspiracy or agreement on the part of plaintiff below to conceal German property, your petitioner objected on the further ground (in addition to violation of Rules 8(c) and 12(h), Federal Rules of Civil Procedure) that no independent proof of such conspiracy or agreement had been made, and no knowledge of plaintiff as to such documents had been shown. (PA 126a, 127a, 128a; Defendant's Exhibit EE, RA 94a)

The trial court, even though it admitted that some facts "were found and others materially corroborated by this documentary evidence", brushed aside the objection, saying:

> "Plaintiff contends earnestly that these negotiations and statements are not relevant unless and until it is shown that a conspiracy to violate the Trading with the Enemy Act was entered into by the parties, including the plaintiff. We think this proposition predicates admissibility too narrowly.
>
> "From a review of the admissions, statements and correspondence of the plaintiff, and his actions and the other circumstances, we have found that plaintiff was a party, along with SAG and the Devisenstelle, to *an agreement made in 1937 to conceal SAG's ownership of a proposed American corporation for business reasons.* Therefore, the declarations of the German parties to this agreement are admissible in evidence against the

[4] Question IV was: "Did the court err in admitting evidence from prior administrative hearings with respect to the property in this proceeding, when no admissions or evasions are shown in connection therewith?"

plaintiff. The agreement need not amount to a conspiracy. Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229 (1917). An agreement once proved is presumed to continue until the contrary is established, and we have found plaintiff did not abandon the agreement to conceal. See United States v. Perlstein, 126 F. 2d 789, 798 (C.A. 3, 1942). For these reasons plaintiff's Motion to Strike the written declarations of the German parties to the agreement and certain admissions of the plaintiff as specified therein is denied." (PA 241a, 242a) (Emphasis supplied)

Review of this ruling was sought on appeal as part of Question III (footnote 3 supra).

IV

The petitioner here was respondent's only witness in the District Court. It was through your petitioner that all of the Government's testimony and documentary evidence was introduced. His testimony was uncontradicted and unimpeached. Thus raised were two interrelated questions concerning the following subject matter:

a. The weight to be given testimony of an adverse party unfavorable to the one calling him, when no contradiction or impeachment of his testimony is made. (PA 232a).

b. Whether the uncontradicted and unimpeached testimony of plaintiff as to the ownership of the property involved could be completely disregarded and held to be not binding upon the defendant who called him. (PA 232a, Opinion of District Court, Footnote 4.)

V

The trial judge concluded that a resulting trust existed in favor of Schloemann A.G. and that your petitioner was trustee thereof. The defense of a resulting trust had not been pleaded nor was any testimony introduced to show that plaintiff either actually or constructively consented to

application of funds for the benefit of Schloemann A.G. Thus the question of law squarely is raised:

> Whether a resulting trust could be found to exist in the absence of pleading it as an affirmative defense, and in the absence of a showing that the recipient of funds assented to their application to the use and benefit of the provider of the funds. (Question V, Petition for Rehearing, R. 144)

VI

A further question of law, involving an interpretation of the Trading with the Enemy Act, is brought into sharp focus by this case. The trial court held that an "*innocuous* agreement of 1937 to conceal German ownership for business reasons . . ." is a proper basis for seizing and retaining property which had been at all times prior to the seizure under the exclusive possession, dominion and control of an American citizen. The District Court in its opinion used these words in relation to this matter:

> "These considerations in the light of the whole record corroborate our conclusion that an agreement to conceal SAG's ownership of its American branch was executed. In reaching this conclusion it is unnecessary to find that plaintiff *consciously* joined in the *obnoxious* 1939 conspiracy between SAG and the Devisenstelle to cloak German ownership so as to prevent seizure in case of war; it is sufficient to find as we do, that he intended to and did carry out the *innocuous* agreement of 1937 *to conceal German ownership for business reasons.* On no other theory can his acts and the acts and declarations of the interested parties in Germany be reconciled. Stoehr v. Wallace, 255 U.S. 239, 251 (1921). See also Kind v. Clark, supra." (PA 241a) (Emphasis supplied)

The question of law thus raised is:

> Can an "innocuous agreement of 1937 to conceal German ownership *for business reasons*" (which agree-

ment we contend was never proved) be made the basis for judgment validating the seizure of property under a law permitting such seizure only when it is shown that the seized property was held for concealment of *enemy* interest or ownership *in event of war.* (Emphasis supplied)

VII

Another important question of law presented on appeal was that the District Court's findings and decision were grounded upon mere guess work, speculation, and surmise. As examples, the District Court found:

> Not that petitioner was, but may have been, employed by the German corporation on a salary basis, viz, "Plaintiff *probably* was paid a salary." (PA 232a)
>
> That even though the petitioner may not have entered into "the *obnoxious* 1939 conspiracy", he *probably* entered into the innocuous agreement of 1937 for *business reasons,* then carried out the latter as a means of concealing *enemy property.* (PA 234a)
>
> That "*probably* in the summer of 1937" an agreement to conceal foreign [not enemy] property was made, though, said the District Court, "There is no direct evidence that this agreement to conceal was entered into at any specific time or place or that it was written or verbal." (PA 234a) (Emphasis supplied)

VIII

The trial court in its rulings and opinion placed an unwarranted burden of proof upon petitioner. The trial court asserted that a principal-agency relationship existed between Schloemann A.G. and petitioner, stating (PA 236a): ". . . It does not appear that he ever notified S.A.G. of his new self-allegiance, or for that matter that he was severing the relationship of principal and agent . . ."

We do not find fault with the abstract principles of law recited by the court. (PA 236a-238a) We do challenge

the application of those principles to this case. In reaching its conclusion that the principal-agency relationship (a relationship we do not concede) precludes plaintiff, the trial court entirely overlooked—and without comment—the conclusions which unavoidably must be drawn from reading defendant's exhibits 105, 106, 108, 109 and 110—exhibits *of the defendant* which are entitled to a greater degree of probative weight than is other documentary evidence from German files accepted as persuasive by the court. (PA 194a-204a; PA 112a)

A further question of law thus arises:

> Whether a court while accepting as persuasive certain documentary evidence may disregard other evidence of precisely the same nature and of as great if not greater probative value to the contrary, so as to reach a conclusion that a principal-agency relationship existed and preclude recovery by petitioner under the Trading with the Enemy Act.

IX

All of the foregoing questions of law, apparent on the face of the record, were before the appellate court for adjudication. One week after argument the court affirmed the judgment of the District Court with a *per curiam* opinion. The opinion in its entirety is as follows:

> "Per Curiam:
>
> "The questions in this case which come to us on appeal are *questions of fact* solely concerning the ownership of stock in an American corporation which is claimed by the successor to the alien property custodian to be German owned at the date of seizure. *The questions of fact involve the examination of a very considerable amount of evidence. The district judge considered each of these questions and came to the conclusion that alien ownership was established satisfactorily. He wrote a careful opinion in which his reasons for the conclusions were explained.* 106 Fed. Supp. 147. *We agree with him and for the reasons he stated.*

"The judgment of the district court will be affirmed." (Emphasis supplied)

The above constitutes the matter involved here.

REASONS RELIED ON FOR GRANT OF WRIT

1. In ignoring the questions of law presented on appeal, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. (Rule 38, 5(b).)

2. The question whether conspiracy, illegality and resulting trust (involved in a claimed agreement to conceal alleged German interests in an American corporation) constitute the types of defenses which must be affirmatively pleaded or be deemed waived, is an important question of Federal law involving rules of evidence, burden of proof and substantive rights which has not yet been, but should be, determined by this Court. (Rule 38 5(b); Rules 8(c), 12(h), Federal Rules of Civil Procedure.)

3. By affirming the action of the District Court in disregarding testimony of plaintiff as an adverse party on the ground that the testimony of one called under Rule 43(b) is not binding on the party calling him even in respect of unimpeached and uncontradicted evidence, the Circuit Court has rendered a decision in conflict with the decision on the same matter by the United States Court of Appeals for the Ninth Circuit in *Universal Pictures Company* v. *Harold Lloyd Corporation*, 162 F. 2d 354, and in an important degree has raised a conflict with its own decision in *Moran* v. *Pittsburgh-Des Moines Steel Co.*, 183 F. 2d 467, 471. In the *Lloyd case*, the Court refused to permit impeachment of Lloyd, who had been called by his opponent under Rule 43(b) while the *Moran* case held that unimpeached testimony of an adverse witness called pursuant to Rule 43(b), Federal Rules of Civil Procedure, was to

some extent binding on the party calling the witness. (Rule 43(b), Federal Rules of Civil Procedure.)

4. The decisions below in effect hold that the Trading with the Enemy Act sanctions seizure of the property of an American citizen on the ground that long prior to any war, he had entered into an "innocuous" agreement to hold property in the United States for business reasons on behalf of foreign interests. The Trading with the Enemy Act never contemplated such a result and it is important in the administration of that law that this question be resolved.

CONCLUSION

It is respectfully submitted that writ of certiorari should be granted.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

STATEMENT OF THE CASE

The case is stated in the petition, with references to the opinions of the courts below and the same hereby are incorporated herein by reference and prayed to be read and considered a part hereof. (*Supra* 1-11)

SUMMARY OF ARGUMENT

1. By disregarding questions of law raised on appeal, the court below in effect nullified petitioner's right to an appeal.

2. By affirming the action of the trial court, the court below permitted respondent to prevail in matters of affirmative defense without pleading such defense, in viola-

tion of Rules 8(c) and 12(h), Federal Rules of Civil Procedure.

3. The Appellate Court sanctioned admission in evidence of prejudicial memoranda and letters from the files of German corporations and the German government, in the absence of proof of knowledge thereof by petitioner, and with no independent proof that petitioner had conspired to conceal German interest in an American corporation in event of war.

4. By sustaining the trial court's finding of a resulting trust, the court below disregarded the requirement that a resulting trustee's assent to the trust purpose must be proven.

5. The Court below erred in sustaining the trial court's finding that, by entering into an innocuous agreement for business purposes in 1937, when there was no war or thought of war, petitioner must, in effect, also be held to have been a party to a conspiratorial project to conceal enemy property in the United States in time of war.

6. By admitting testimony of plaintiff below from previous administrative hearings, despite the presence of plaintiff on the witness stand and in the absence of any direct testimony concerning the subject matter of the prior testimony, the trial court deprived petitioner of a trial *de novo* unembarrassed by previous administrative actions.

7. The court erred in holding that unimpeached and uncontradicted testimony of an adverse party called under Rule 43(b), Federal Rules of Civil Procedure, was not to any extent binding on the party so calling him. This holding produced conflict with another circuit.

8. The court erred in holding that a principal-agency relationship which the trial court found to exist between Schloemann A. G. and petitioner precluded petitioner from recovering the property seized.

ARGUMENT

1. By Disregarding Questions of Law Raised on Appeal, the Court Below in Effect Nullified Petitioner's Right to an Appeal

The opinion of the Court of Appeals views the case coming to it as comprising solely *questions of fact* concerning the ownership of stock in an American corporation. The court stated that such questions of fact involved *the examination* of a very considerable amount of evidence; and that the District Judge had considered *each* of *"these questions"* and came to the conclusion that alien ownership was satisfactorily established. The Appellate Court then declared the trial Judge wrote a careful opinion in which his reasons for the conclusions were explained. The appellate decision was simply this without more:

> *"We agree with him and for the reasons he stated."* (Emphasis supplied)

Manifestly, the Circuit Court of Appeals accepted in toto the conclusions of fact arrived at by the District Judge and, without independent examination of the record, ignored all questions of law appearing on the face of the record.

If the sole questions here involved had been ones of fact, and if the conclusions of fact of the trial court had been based upon competent testimony, properly admitted into evidence, the appeal below would never have been taken. The appeal was taken because improper conclusions of the district court with respect to questions of law have wiped out at one stroke the fruits of a lifetime of effort for a substantial American citizen.

This is an equity case calling for careful examination of the entire record on appeal. There were questions of law involved in the appeal which the petitioner was entitled to have reviewed, considered and determined. These questions of law, among other things, involve the application of the Federal Rules of Civil Procedure with respect to plead-

ing, the rules of evidence with respect to the admission of testimony, the elements of a resulting trust, the admission of evidence from prior administrative hearings when such evidence was directly available at the trial, and the question whether, as a matter of law, mere negotiations in 1937 exploring the desirability of organizing an American corporation (when there was neither war nor thought of war) could be taken as proof of consummation of an agreement in 1939 (when there was talk of war but still no war) to conceal *enemy* ownership in or of American property in event of war and in violation of the Trading with the Enemy Act.

Litigants are entitled to a careful examination of the questions of law arising on appeal. Many years ago this court (*Post* v. *Jones et al.*, 19 How. 150) adopted and stated the rule governing the right of appeal. Careful research discloses no change in that rule from that day to this. The rule was stated (at page *160*) as follows:

> "While we assent to the general rule stated by this court in *Hobart* v. *Drogan*, 10 Pet. 119, that 'it is against policy and public convenience to encourage appeals of this sort in matters of discretion,' yet it is equally true, that where the law gives a party an appeal, he HAS THE RIGHT TO DEMAND THE CONSCIENTIOUS JUDGMENT OF THE APPELLATE COURT ON EVERY QUESTION ARISING IN THE CAUSE. . . ." (Emphasis supplied.)

It is especially necessary in a case such as this that all of the rights of appeal be preserved, for the Trading with the Enemy Act properly puts into the hands of the executive branch of the government a power which is extreme and arbitrary so that in time of war speedy and effective steps can be taken to thwart saboteurs or those who seek to turn our property to an enemy's benefit. In discussing the broad power of seizure and the scope of the custodian's power to vest so as to include interests of friendly as well as unfriendly aliens, Mr. Justice Reed for this court said in *Silesian American Corporation* v. *Clark*, 332 U.S. 476-477:

> "Every resource within the ambit of sovereign power is subject to use for national defense. This section was amended during the war to cover the taking of alien property. It is limited to a war or a declared emergency period. While a natural hesitancy exists against so interpreting the war power clause as to expand its scope to cover incidents not intimately connected with war, we think reasonable preparation for the storm of war is a proper exercise of the war power. . . . This taking may be done as a means of avoiding the use of the property to draw earnings or wealth out of this country to territory where it may more likely be used to assist the enemy than if it remains in the hands of this government. . . . The problems of compensation may await the judicial process. . . . War brooks no delay. The Constitution imposes none."

Strangely, war apparently brooked great delay in this case. The record shows that from December 10, 1941 (PA 126a) to October 1942 (PA 113a, 114a) a close supervision and control over the affairs of the corporation whose stock was later seized was exercised by the Treasury Department and at the end of that time that department decided there was no enemy or foreign interest therein involved. (Exhibit 5, PA 136a). It was not until January, 1944, that the vesting order issued and the property was seized.

The trial court, in his opinion, noted the delay, remarking that under the direction of the plaintiff below, the corporation prospered greatly, *especially during the war.* Then he stated in so many words:

> *"The Government delayed seizure of the stock until 1944 after the vital extrusion presses had been designed and built."* (PA 248a)

All of the matters above stated and those hereinafter set forth bespeak a need for exceptionally careful review on appeal where there is under examination the question of the proper or wrongful exercise of the vast war power which can be used in derogation of the most cherished and per-

sonal American rights. This appeal was not characterized by such careful review.

2. By Affirming the Action of the Trial Court, the Court Below Permitted Respondent to Prevail in Matters of Affirmative Defense Without Pleading Such Defense, in Violation of Rules 8(c) and 12(h), Federal Rules of Civil Procedure

Rule 8(c), Federal Rules of Civil Procedure, specifically requires that "fraud, illegality . . . and any other matters constituting an avoidance or affirmative defense . . ." shall be set forth affirmatively when a party is pleading to a preceding pleading.

Rule 12(h) of the Federal Rules of Civil Procedure provides that "a party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply. . . ."

These rules were not complied with by the defendant at trial. In our petition for certiorari, *Supra*, 4, 5, we have detailed the technique employed by the defendant to avoid pleading conspiracy and a constructive trust as affirmative defenses. Over strenuous objections by plaintiff, defendant was permitted to introduce testimony and documents from which the trial court concluded that ". . . plaintiff was a party along with S.A.G. and the Devisenstelle, to an agreement made in 1937 to conceal S.A.G.'s ownership of a proposed American corporation for business reasons." (PA 242a) The court also found that ". . . the facts and circumstances still show that S.A.G. was the beneficial owner of the stock upon a resulting trust." (PA 242a) From these statements it is apparent that the court relied upon the evidence alleged in the conspiracy and the resulting trust.

It is our position that, although this court has never passed upon the question of whether conspiracy and resulting trust are matters of affirmative defense, such matters are on a par with other matters and things that have clearly

been decided to be of such nature, including contributory negligence, accord and satisfaction and other defenses listed in Rule 8(c) (*Van Sant* v. *American Express Co.*, 169 F. 2d, 355; *Tornello* v. *Deligiannis Bros.*, 180 F. 2d, 553; *Zeligson* v. *Hartman-Blair*, 135 F. 2d, 874; *Bergeron* v. *Mansour*, 152 F. 2d, 27; *Topping* v. *Fry*, 147 F. 2d, 715; *Rank* v. *Krug*, 90 F. Supp. 773; *Headrick* v. *A. T. & S. F. Ry.*, 182 F. 2d, 305; *Carter* v. *Powell*, 104 F. 2d, 428; *Producers' Releasing Corp.* v. *Pathe Industries*, 10 FRD 29; *Phillips* v. *Baker et al.*, 121 F. 2d, 752.)

Like those other defenses, conspiracy and resulting trust must be affirmatively pleaded. Having failed to allege in the pleadings the intricate conspiracy and resulting trust (with respect to which defendant on trial utilized more than 455 pages of the transcript and 90 exhibits), such matter was waived and was not lawfully available to defendant under Rule 12(h), Federal Rules of Civil Procedure. (See cases cited *supra.*)

It is important further to note that when precisely the same defense if conspiracy was raised in *Kaufman* v. *Societe Internationale* (343 U.S. 156, 157) it was specially pleaded by the Alien Property Custodian. In that case the Custodian did not rely on a general denial (as was done in the case at bar) but answered that the Swiss Corporation (whose stock had been seized) was dominated and controlled by officers, agents and stockholders who were engaged in a conspiracy with the German government to operate the company's business in their interests while the United States and Germany were at war. This is the selfsame defense that was here contended to be a "rule of evidence" and not a matter of pleading.

Refusal of the circuit court to review the question of law thus presented to it was error which should be examined by this court.

3. The Appellate Court Sanctioned Admission in Evidence of Prejudicial Memoranda and Letters From the Files of German Corporations and the German Government, in the Absence of Proof of Knowledge Thereof by Petitioner and With No Independent Proof That Petitioner Had Conspired to Conceal German Interest in an American Corporation in Event of War.

The trial court announced that some facts were found and others materially corroborated by documentary evidence consisting of interoffice memoranda of Schloemann A. G. officials and correspondence between German firms and the German government. (PA 241(a)) These documents were found after World War II by American Government agents in the files of Schloemann A. G. and certain German government agencies. Nowhere was it shown that plaintiff even knew of their existence and, as a matter of fact, he did not. The trial court held with respect to these documents that to contend that such negotiations and statements were not relevant unless and until it was shown independently that a conspiracy to violate the Trading with the Enemy Act was entered into by the plaintiff, "predicates admissibility too narrowly". (PA 241a)

Accordingly, to justify admission of the documents, statements and correspondence, the trial court announced that it found plaintiff was a party along with Schloemann A. G. and the German government to an agreement made *in 1937* to conceal Schloemann A. G.'s ownership of a proposed American corporation *for business reasons.* (PA 242a)[1] On this ground the declarations of the German parties to the alleged agreement *in 1939* for concealment of enemy property in violation of the Trading with the Enemy Act were declared admissible against the plaintiff at trial.[2]

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[1] Strangely, the only parties to this alleged 1937 agreement previously mentioned by the court had been "petitioner and certain officers of S.A.G." (PA 234a)

[2] We have already shown in Point 2, hereof that evidence of an unpleaded conspiracy is not properly before the court.

We submit that the basis for admission of the German documents was not proper. It is settled law that there must be independent proof of either a conspiracy or an agreement between the parties thereto before the admission or declaration of any one of them is admissible against any other of them. (*Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U.S. 229; 11 Am. Jur. Conspiracy Sec. 42).

The court was unable to find a conspiracy (PA 241a), so it was compelled to resort to the so-called "innocuous agreement of 1937". With reference to this agreement the court declared:

> "These considerations in the light of the whole record corroborate our conclusion that an agreement to conceal SAG's ownership of its American branch was executed. In reaching this conclusion it is unnecessary to find that plaintiff *consciously* joined in the *obnoxious 1939 conspiracy* between SAG and the Devisenstelle to cloak German ownership so as to prevent seizure in case of war; it is sufficient to find as we do, that *he intended to* and did carry out the *innocuous agreement of 1937* to conceal German ownership *for business reasons.* On no other theory can his acts and the acts and declarations of the interested parties in Germany be reconciled. Stoehr v. Wallace, 255 U.S. 239, 251 (1921). See also Kind v. Clark, supra." (PA 241a) (Emphasis supplied)

The record does not support the so-called "innocuous" agreement any more than it would have supported conspiracy. We have examined the record very carefully and we fail to find anywhere in the record proof of participation by the German government in the Feller-Schloemann A. C. dealings, prior to January 23, 1939 (Ex. SSS, RA 103a). Furthermore, the district court cited no specific instance prior to that time to support his finding.

To admit such evidence on the strength of an alleged agreement of 1937, to which the German government was not even a party, was error.

4. By Sustaining the Trial Court's Finding of a Resulting Trust, the Court Below Disregarded the Requirement That a Resulting Trustee's Assent to the Trust Purpose Must be Proved

A fundamental requirement of a resulting trust is that the provider of the funds shall have intended that the property purchased with the funds be held for his benefit. (See Restatement of Trusts, American Law Institute, 1945, as amended, Section 441.) This rule has been followed in Pennsylvania. The Pennsylvania Supreme Court has announced the rule to be that the presumption of a resulting trust in "A" where "B" pays the consideration and title is placed in "A" is rebutted by a showing that a resulting trust is at variance with the *mutual* intention of the parties. (*Zimmerman* v. *Barber,* 176 Pa. 1; 34 A. 1002). Both the trial court and the Court of Appeals have overlooked this fundamental requirement of law.

We look in vain for evidence in the record of a positive or direct nature to the effect that plaintiff below, petitioner here, assented to taking funds of the German corporation for the purpose of purchasing stock and holding the same for it or that Schloemann A. G. intended that property was to be purchased for its benefit.

On the contrary, the record is replete with evidence that your petitioner here refused to accept money on a proposal to cloak the ownership of the American corporation and that the same was finally advanced only upon the basis of a personal loan to him. (Exhibit 7, PA 141a; PA 51a)

The record shows no evidence of intent at the time of an advance of funds to the plaintiff that the one advancing the funds intended anything other than a loan. The accounts of Schloemann A. G., sworn to and tendered to the United States Government (see Plaintiff's Exhibit 6, PA 137a), indicate that nothing more than a loan personally made to the plaintiff was intended. The entry of the loan on the books of the German corporation, as well as the sworn statement of the German corporation immediately after the war, is evidence that the corporation advancing

the money did not intend a resulting trust to arise, so as to acquire an ownership interest in the American corporation. These entries reveal the only claims to be on account of "loan" and "current account"—items of mere debt. (PA 140a)

5. The Court Below Erred in Sustaining the Trial Court's Finding That, by Entering Into an Innocuous Agreement in 1937 for Business Purposes, When There Was No War or Thought of War, Petitioner Must, in Effect, Also be Held to Have Been a Party to a Conspiratorial Project to Conceal Enemy Property in the United States in Time of War

The object of the Trading with the Enemy Act is to prevent property here or in the control of one under the jurisdiction of the United States from being used for the benefit of an enemy. The seizure power is granted for that purpose. The District Court here has justified a seizure under the Trading with the Enemy Act upon testimony and evidence that at one time there was a discussion of forming a corporation in the United States for business purposes with no thought of war. The court inferred that there was an *innocuous* agreement entered into in 1937 and that it was not even required to find the existence of an *obnoxious* agreement in order to justify the seizure. (PA 241a)

Any agreement—innocuous or otherwise—justifying seizure under the Trading with the Enemy Act would have as its very essence a *hiding*—in this case a *hiding* of property to preserve it for the enemy. There was no such *hiding* here. The record clearly reflects a complete disclosure by petitioner, on or about December 10, 1941, of all transactions with Schloemann A. G. There was clear evidence that petitioner had refused to consider a proposal *to conceal enemy property in event of war*. His action on December 10, 1941 (the day war was declared with Germany), when he made a full and complete disclosure of the property holdings, investment interests and financial status of the American corporation to the United States Government representatives (PA 126a), stands unchallenged and un-

contradicted although the agents to whom he made the disclosures were available to testify for defendant, but were not called (Unprinted transcript of Testimony, R. 682, 683.)

A previous instance of disclosure and cooperation had occurred during the Spring and Summer of 1939, at the time the corporation was being activated. Petitioner made available the records of his business and discussed it fully with representatives of the United States Government in connection with a claim by United States Customs authorities against Schloemann A. G. (Unprinted Transcript of Testimony, pp. 528-532)

Disclosure is the antithesis of concealment. The act of disclosure, taken in conjunction with the written and oral statements by petitioner that he *refused to conceal* enemy property at any time, stands as unrefuted evidence of lack of his necessary assent to the "*obnoxious*" agreement.

The inference of the District Judge that petitioner consented to conceal enemy property in case of war fails, as a matter of law, in the face of all this unrefuted evidence and constitutes an error.

6. By Admitting Testimony of Plaintiff Below From Previous Administrative Hearings, Despite the Presence of Plaintiff on the Witness Stand and in the Absence of Any Direct Testimony Concerning the Subject Matter of Prior Testimony, the Trial Court Deprived Petitioner of a Trial De Novo, Unembarrassed by Previous Administrative Actions

The policy and law laid down by this Court in *Stoehr* v. *Wallace*, 255 U.S. 239, for the enforcement of rights of citizens or others whose property has been seized under the Trading with the Enemy Act is:

> "It [Sec. 9 of the Trading with the Enemy Act] distinctly reserves to any claimant who is neither an enemy nor an ally of an enemy a right *to assert* and *establish* his claim *by a suit in equity* unembarrassed by the precedent executive determination." (Emphasis supplied)

In the face of this clear statement of the law, respondent called petitioner to the stand as an adverse party under Rule 43(b), Federal Rules of Civil Procedure, and then proceeded to read from the records of the 1944 and 1949 administrative hearings evidence there given by petitioner. The manner of introduction is described in the foregoing petition for certiorari. (*Supra,* 5; PA 45a)

Plaintiff's position was that unless the basic question which had been put at the administrative hearing was again put at trial, the result would be to deprive him of a *de novo* trial. The Court held that the testimony of the administrative hearing in 1944 (PA 47a, 48a, 49a, 50a and 70a) and in 1949 (RA 32a) was admissible to show evasion, lack of good faith and admissions. The matters involved also embraced documents introduced as exhibits in the administrative hearings and testimony concerning the same.

A cursory examination of the record is sufficient to indicate that this procedure constituted an essential part of the defense case at trial.

It is petitioner's contention that the use of the matters involved in the administrative hearings as alleged "admissions" or to show "bad faith" in a claim there made, was an expedient to violate the policy and law laid down by this court in *Stoehr* v *Wallace, supra.*

7. The Court Erred in Holding That Unimpeached and Uncontradicted Testimony of an Adverse Party Called Under Rule 43(b), Federal Rules of Civil Procedure, Was Not at All Binding on the Party So Calling Him. This Holding Produced Conflict With Another Circuit

The district judge held that after calling plaintiff under Rule 43(b), Federal Rules of Civil Procedure, the defendant was not bound by his uncontradicted testimony. (PA 232a, footnote 4) The Court said:

> "We think plaintiff's testimony in this respect was contradicted by the correspondence and circumstantial evidence, but even if it were not, *the defendant is not*

bound. Moran v. Pittsburgh-Des Moines Steel Co., 183 F. 2d 467, 471 (CA 3 1950)."

Petitioner's position is that the testimony of an adverse witness is entitled to at least some weight and so stands until proven untrue by competent evidence. We do not read the cited case *supra* as holding that unimpeached testimony of an adverse witness under Rule 43(b) is not *at least to some extent binding* on the party calling him, but as holding that an instruction that such testimony is "*conclusive*" in the absence of rebuttal was error.

The trial court's ruling and its affirmance on appeal is in conflict with the *Pittsburgh-Des Moines Steel Co.* case, *supra* (CCA 3) and also with *Universal Pictures Co.* v. *Harold Lloyd Corp.*, 162 F. 2d 354 (CCA 9). There, Lloyd, a corporate representative, was called as an expert witness by his opponent who, *after laying a foundation for impeachment,* sought to discredit Lloyd's testimony by showing that on a prior occasion and in a different case he had given testimony at variance with that given in the pending case. The trial court and the court of appeals refused to permit that method of impeachment.

Here, respondent called the petitioner to the stand in the district court, as a supposedly adverse witness, and asked him to (and he did) identify a large number of documents which the Government regarded as tending to establish a conspiracy to conceal German property and assets. *No foundation whatever* was laid for the impeachment of appellant with such documents; and the government sought merely to have it inferred that they negatived or impeached respondent's claim in this case.

To the contrary of the government's ideas, petitioner explained as to the documents that, while some of them had *proposed* a "cloaking" or concealment of German assets in the event of war, *no such agreement was ever accepted or entered into by him. That testimony and explanation stands unimpeached, indeed unchallenged.*

The instant case is nothing more than an attempt at impeachment by mere inference—not by direct evidence, as contemplated by all rules of evidence and procedure.

Rule 43(b) provides merely that a witness called thereunder may be "*interrogated*" as if he had been called by his own side, as on cross-examination. The Rule does not relax the requirement that a foundation must be laid for impeachment; and, clearly, it does not permit the party calling an adverse witness to throw innumerable documents at the witness and then claim that, by inference, they defeat his suit or claim, without more.

To refuse credence to petitioner's unrefuted testimony in this situation was error.

8. The Court Erred in Holding That a Principal-Agency Relationship, Which the Trial Court Found to Exist Between Schloemann A.G. and Petitioner, Precluded Petitioner From Recovering the Property Seized

The district court opinion discusses at considerable length Pennsylvania rules applicable to principal and agent. These rules are general in scope and we do not find fault with them here. We do say, however, that they have not been properly applied to the case at bar.

The court has in large measure relied upon documents and testimony which we have hereinbefore shown should not have been admitted in evidence (see Argument, Points 2 and 3, *supra*). The court erred in admitting this evidence but it even went further. It chose to disregard that portion of this evidence which shows conclusively the soundness of petitioner's position.

Among the most recent documents, datewise, included in the vast number returned from Germany after the war, were exhibits 105, 106, 108 and 109 (PA 194a, 198a, 200a, 202a); also relevant here is exhibit 110 (RA 112a) dated July 19, 1939. These memoranda were filed away during the days and weeks immediately prior to activation of petitioner's new corporation and they show conclusively that petitioner's final position was a flat refusal to countenance

a cloaking or hiding of assets in the face of approaching war. He insisted upon a loan with which to launch his corporation and the corporate officials of Schloemann A. G. clearly understood him, as the file exhibits above referred to so clearly point out.

The trial court took no notice of these exhibits and found that the principal-agent relationship precluded petitioner on the ground that the principal had no notice of petitioner's intention to acquire the business for himself. How could notice be more clearly established than by Exhibits 105, 106, 108, 109 and 110? They are statements by the very men to whom the notice should, under the court's rule, have been given.

The ruling aforesaid concerning principal and agent is in error and should be reviewed by this court.

CONCLUSION

In its opinion (PA 248a) the trial court said of petitioner:

> "As a witness, Mr. Feller's sincerity was impressive and made our solution of the case most difficult. He rendered important war time services to the United States. . . ." (PA 248a)

That same trial court, recognizing that the government had delayed seizure until 1944 (by which time petitioner's "important war-time services" had provided this country with "the vital extrusion presses" so badly needed for the war effort"), sanctioned the taking of the very property which had vitally aided our national war effort. The basis of the trial court's action—affirmed by the Appellate Court—was that the property had been acquired and was held by petitioner for the use and benefit of the enemy.

A grave injustice thus has been done to an American citizen, first because of an erroneous application of the law by the District Court and secondly because the Court of Appeals failed or refused to review the questions of law presented to it.

Petitioner has herein developed the questions of law that should have been, but were not, passed upon by the Court of Appeals. It is respectfully submitted that writ of certiorari should be granted to review those questions, and that upon further consideration, the judgments of the District Court and of the Court of Appeals be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 73

KARL FELLER, PETITIONER

v.

HERBERT BROWNELL, JR., ATTORNEY GENERAL OF THE UNITED STATES AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (P.A. 229-250)[1] is reported at 106 F. Supp. 147. The *per curiam* opinion of the Court of Appeals (R.A. 139-140) is reported at 201 F. 2d 670.

JURISDICTION

The judgment of the Court of Appeals was entered January 30, 1953 (R.A. 140). A petition for

[1] In referring to the record we adopt petitioner's usage of designating references to Appellant's Appendix below as "P.A.—", and to Appellee's Appendix as "R.A.—".

rehearing was filed February 12, 1953 (R.A. 141) and denied February 19, 1953 (R.A. 150). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the concurrent findings of fact by the courts below that petitioner was not the beneficial owner of certain vested shares of stock, and therefore not entitled to recover under Section 9(a) of the Trading with the Enemy Act, were clearly erroneous.

2. Whether the district court erred in certain rulings on admissibility of evidence.

3. Whether, when the pleadings put in issue the question whether petitioner or an enemy was the beneficial owner of the shares prior to vesting, respondent was required to plead as an affirmative defense a conspiracy to conceal enemy ownership of the shares.

STATEMENT

Petitioner sued the Attorney General, as successor to the Alien Property Custodian, under Section 9(a) of the Trading with the Enemy Act to recover 5000 shares of the stock of Schloemann Engineering Corporation, a Delaware corporation, which the Custodian had vested on a finding that they belonged to Schloemann Aktiengesellschaft ("Schloemann A.G." or "Schloemann"), a German corporation, although they stood of record in the name of petitioner (P.A. 6). After a trial the District

Court for the Western District of Pennsylvania found that Schloemann A. G. had been the beneficial owner of the shares and entered judgment for respondent (P.A. 249-250). The Court of Appeals for the Third Circuit affirmed on the opinion of the district court (R.A. 139-140).

Schloemann Engineering Corporation was engaged in Pittsburgh in the marketing and designing of heavy machinery, chiefly motor rollers and extrusion presses (P.A. 5). It started to do business August 15, 1939, after petitioner, to whom the shares had been issued in May 1939 (P.A. 41), paid $50,000 to it on August 14, 1939 (R.A. 2). This $50,000 was furnished to petitioner by Schloemann A. G., through Kleinwort & Sons, an English banking house, and Goldman, Sachs & Co. of New York (R.A. 2-3, 87-89).

When the corporation started business it took over without formal assignment the business and assets of a company known as Schloemann Engineering Company (R.A. 4), also located in Pittsburgh, which had been an unincorporated branch of Schloemann A. G. since 1927 (P.A. 40). The assets of the branch had been owned by Schloemann (R.A. 2), and petitioner had been manager of the branch, with powers of attorney from Schloemann dating back to 1927 or 1928 (R.A. 10-11).

As early as 1931 the parties started to discuss the incorporation of the Pittsburgh branch. To set up an entity in Pittsburgh would facilitate banking connections and have other business advantages,

but the prime reason, according to Feller, was the question of Customs valuation. Up to 1936 the business of the Pittsburgh branch was largely the importation of extrusion presses manufactured in Germany (P.A. 85). Feller thought that the value declared for such presses might be open to serious question, especially when the machinery was purchased from a manufacturer affiliated with Schloemann,[2] and he and the Schloemann officials seem to have hoped that they could achieve a saving in duties and also ward off inconvenient inquiries and investigations by Customs officials if the American branch could be transformed into an apparently independent American corporation. (P.A. 93, 178, 180, 212; R.A. 23-26, 84, 98, 103, 108.) See also Def. Ex. SS, a memorandum from the Schloemann files, which Feller helped to prepare (P.A. 177-182 and 90).

At a conference in Germany in May 1937, between Feller and the Schloemann officials, it was decided to incorporate the Pittsburgh business and that Schloemann would own the shares (P.A. 182-183).[3] On July 2, 1937, and August 2, 1937, Feller wrote letters to the Germans in which he discussed plans for concealing Schloemann's ownership of the corporation by putting the shares in his name (R.A. 17-20, 77-82).

The discussions continued, and in October, 1938,

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[2] Schloemann itself, like the branch, was a designer, not a manufacturer (R.A. 24).

[3] Feller initialled the original of this memorandum in Schloemann's files (P.A. 100).

petitioner conferred in Germany with the Schloemann officials about plans for his holding the stock for the benefit of Schloemann (R.A. 54-56). At this time petitioner received from Kleinwort & Sons a letter of introduction to Goldman, Sachs & Co. in New York, with whom the certificates were to be deposited (R.A. 90-91).

After petitioner returned to the United States he organized the corporation, Schloemann Engineering Corporation, in December 1938, and was elected president and treasurer (R.A. 65-68). The directors voted to accept the assets of the Schloemann branch in payment for 5000 shares of stock (R.A. 66). At that time, according to petitioner's testimony, he was willing to go ahead with the plan of his holding the stock for Schloemann's benefit (R.A. 54-56).

Although the corporation was organized in December, it did not then take over the assets of the branch or start business (R.A. 2). As petitioner knew, Schloemann could not proceed with the incorporation of the branch without approval by the Devisenstelle, the foreign-exchange agency of the German government (R.A. 6-7). After a further conference in Germany in January 1939, in which petitioner participated, Schloemann applied for such a permit (R.A. 103-107).[4]

On April 27, 1939, petitioner wrote Schloemann

[4] The exhibit referred to was a copy of Schloemann's application for a permit. It does not appear that Feller saw the application, but he testified that he was "upset" when he learned in January, 1939 that Schloemann had not yet applied (Tr. 378, not printed).

another letter commenting on some changes in the proposed forms of agreement (R.A. 76). In particular he objected to being personally liable for the "loan" of $50,000 Schloemann was going to make. As of that date, he admitted, he was still to hold the stock for Schloemann's benefit (R.A. 15-16).

In a letter of May 3, 1939, Schloemann advised Feller about the proposed handling of the $50,000 "loan" (R.A. 87-89). The plan was this: Schloemann had a Devisenstelle permit to make a payment of $100,000 to the Mesta Machine Company. The $100,000 would be paid with $50,000 from the funds of the Pittsburgh branch and with $50,000 more sent over from England. Then the $50,000 taken from the branch funds would be replaced by $50,000 paid to Feller through Kleinwort, Sons & Co.[5] Feller actually paid Mesta May 1 (R.A. 28), after receiving instructions by telephone from Hentschel, the head of Schloemann, on April 27 (R.A. 4-5).

The May 3 letter was brought to Feller by a business associate, Drexler, who had been in Germany conferring with the Schloemann officials. He also brought with him a letter of May 4, with which were enclosed 9 documents relating to the proposed conversion of the branch into a corporation (R.A. 89). One of them provided for a 30-year option on the shares to be held by Kleinwort and for the deposit of the certificates with Kleinwort's New

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[5] The details are spelled out in a letter of April 28 from Schloemann to the Devisenstelle (R.A. 116-118). According to the May 3 letter, Dr. Hentschel gave Feller the information in a telephone talk April 27.

York agents. According to this option Kleinwort could "buy" the shares at $10 a share, and set off the purchase price against the $50,000 "loan" to Feller. (P.A. 224-226.)

Feller had some of the agreements re-drawn and mailed to Germany for signature (P.A. 183-184). As to the option, he cabled Schloemann on May 16 or 17 suggesting a change in form (P.A. 185), and he wrote at length on June 19, objecting that the proposed unlimited option was not "plausible" and would only lead to an investigation (P.A. 207-213). His letter stated:

> Can you imagine that it would sound plausible if some business man tried to say he had signed in good faith a contract which leaves him no possibility of obtaining any proceeds from the sale of the shares "belonging to him (!)"? Without the words: "in the event of your default under paragraph 3" the bank would have, for example, the absolutely unlimited right to demand the shares, and in the amount of the loan, even if, instead of $10, they should be worth say $15 per share. On the other hand, under the contract $50,000 would have to be paid back, even if their value had fallen to $5. per share and the shares were thus worth only $25,000. In view of such a fabulous state of affairs, one could hardly expect anything else but an investigation of the basis.

He followed this letter with one of June 28, in which he characterized the proposed form of option as an "impossibility" (R.A. 92-93).

On receipt of these letters Schloeman negotiated again with the Devisenstelle, which had previously approved the plan for the option to an English bank (R.A. 118-119), and represented that in view of the danger of war with England, they had come over to petitioner's idea that the use of an English bank might result in the loss of their security (R.A. 123-124). On August 9, 1939, these negotiations culminated in an agreement between Schloemann and the Devisenstelle, that Schloemann should rely on Feller's oral promise to deliver the shares when required in settlement of his debt (R.A. 124-126, 126, 130-131).

On the same day, August 9, petitioner had a transatlantic telephone talk with Hentschel, the head official of Schloemann. According to petitioner, all that Hentschel said was that negotiations with the German government about sending the money were still "incomplete", that the forms of contract were being sent,[6] and that there was to be no option (R.A. 12-14). That was the only telephone talk petitioner had with Hentschel in August about the money (R.A. 14). The record contains no letter or cable from Schloemann explaining the terms on which the $50,000 was handed over.

On August 11, 1939, Goldman, Sachs sent the $50,000 to Feller (R.A. 68) and on August 14 he paid it into the corporation, which started to do business. Towards the end of August he received a letter from Schloemann with three signed contracts (R.A. 94). One was a contract by which Fel-

[6] An agency contract, a contract between Feller and Schloemann and a form of voting trust.

ler agreed to act as general manager and officer of the new corporation, to provide $50,000 capital and to subject the stock to a voting trust, one trustee to be himself and the other to be named by Schloemann; there was also a clause that Feller was to be under no liability other than that arising from his ownership of the stock (P.A. 204-206). By the second contract Schloemann appointed the new corporation its sole agent in the United States and agreed to turn over to it its patents, and the new corporation agreed to pay Schloemann the net book value of the assets taken over (P.A. 214-217). The third contract was a voting trust, signed by Hentschel and Feller as voting trustees, but with some blanks in the text where dates and names were not filled in (R.A. 217-223).

According to Feller, he never communicated with Schloemann A. G. about completing the voting trust (R.A. 47), nor did he communicate with Schloemann to disavow any of the terms of the other agreements (R.A. 52-53).

There was also evidence that he never told Schloemann that he was willing to be personally liable for a $50,000 loan (R.A. 39) and that he never told Schloemann that he planned to acquire the corporation personally (R.A. 59). Finally, there was evidence that in 1944, at a hearing held on his claim by the Custodian's office, Feller denied knowledge that the $50,000 came from Schloemann and said that he had made no inquiry about the remittance and did not advise Schloemann that he had received it (P.A. 46-49).

The district court found that up to August 14,

1939, the assets of the Schloemann Engineering Company belonged to Schloemann, and that Feller was Schloemann's agent; that Feller, Schoemann, and the German government agreed to conceal Schloemann's beneficial ownership of these assets by incorporating the company and making it appear to be an independent American corporation; and that the $50,000 was paid over for that purpose (P.A. 249-250). In these findings the Court of Appeals concurred (R.A. 139-140).

ARGUMENT

This case involves only a question of fact of no general importance. The concurrent findings of fact made by the courts below are correct, and no reason for further review is presented. There is no conflict of decisions.

1. On the evidence, petitioner admittedly was willing, as late as April 27, 1939, to participate in a scheme to conceal Schloemann's ownership of the shares by taking record title in his name. He never told Schloemann that he would take the $50,000 as a loan for which he would be personally liable and he never told them that he planned to acquire the corporation for himself (R.A. 39, 59). The district court found that the $50,000 was paid as part of the plan to conceal Schloemann's ownership and that petitioner joined in the plan (P.A. 249-250). The intent of the parties being in issue, and petitioner having testified to his intent, these findings, affirmed by the Court of Appeals, cannot be said to be "clearly erroneous". *United States* v. *Yellow Cab*

Co., 338 U.S. 338, 340, 342; *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 433 (C.A. 2). Two courts have now ruled adversely to him on the critical facts. See *Comstock* v. *Group of Institutional Investors*, 335 U.S. 211, 213-214.

Since petitioner took the record title to the shares as a "cloak" or nominee for Schloemann, which was the real owner, the shares were enemy property which he could not recover under Section 9(a). *Stoehr* v. *Wallace*, 255 U.S. 239; *Standard Oil Co.* v. *Clark*, 163 F. 2d 917, 923 (C.A. 2), certiorari denied, 333 U.S. 873; *Beck* v. *McGrath*, 182 F. 2d 315 (C.A. 2); *Vort* v. *McGrath*, 99 F. Supp. 57 (D. D.C.), affirmed, 199 F. 2d 782 (C.A.D.C.), certiorari denied, 345 U.S. 911.

2. Nor has petitioner shown error in the trial court's rulings on admission of evidence. The statements of Schloemann to the German government, and of Schloemann officials to each other, as well as the permits and instructions from the government, were admissible as the declarations of coconspirators made in furtherance of the conspiracy. However "innocuous" from the point of view of the Trading with the Enemy Act the agreement made in 1937 for "business reasons" to conceal the ownership of the corporation to be formed, the parties admittedly intended to deceive at least the Customs authorities, so it was a conspiracy to deceive or defraud the United States. *Hamburg-American Steam Packet Co.* v. *United States*, 250 Fed. 747 (C.A. 2), certiorari denied, 246 U.S. 662; *Wallenstein* v. *United States*, 25 F. 2d 708, 711 (C.A. 3),

certiorari denied, 278 U.S. 608; *United States* v. *71.41 Ounces Gold Filled Scrap,* 94 F. 2d 17 (C.A. 2). The agreement was a "partnership" within the test enunciated in *Hitchman Coal & Coke Co.* v. *Mitchell,* 245 U.S. 229, 249. The conspiracy was proved, independently of the statements, by petitioner's own correspondence and admissions.

In a number of similar cases under Section 9(a) of the Trading with the Enemy Act statements of co-conspirators have been held admissible. *Beck* v. *Clark,* 88 F. Supp. 565, 568 (D. Conn.), affirmed *sub nom. Beck* v. *McGrath,* 182 F. 2d 315 (C.A. 2); *Vort* v. *McGrath, supra,* at p. 63.

Nor was there any error in the admission of petitioner's former testimony at the administrative hearings. Petitioner did not take the stand in his own case in chief, so the defendant called him under Rule 43(b) as an adverse witness (P.A. 14-37). In the course of the examination he was asked whether he had not given certain testimony in the administrative hearings held in 1944 and 1949 on his claim for the return of the vested shares.[7] For example, in 1944 he admitted that his letter of August 2, 1937, related to a proposal to conceal Schloemann's ownership of the stock (R.A. 16-18) and that when he wrote his letter of April 27, 1939, the

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[7] The hearing in 1944 was held under Section 9(a). See, Office of Alien Property Custodian: *Final Determinations of the Vested Property Claims Committee* (Government Printing Office, 1946), pp. 55-69. The 1949 hearing was under Section 32, which provides for discretionary administrative returns. *McGrath* v. *Zander,* 177 F. 2d 649 (C.A.D.C.). The findings made at those hearings had no binding effect whatever in the suit under Section 9(a), see P.A. 11, 45.

plan was still that he was to hold the shares in his name for Schloemann's benefit (R.A. 14-15). These admissions were clearly admissible as tending to establish facts inconsistent with the claim of *bona fide* ownership. *Pan American Co.* v. *United States,* 273 U. S. 456, 498-499; *Northeastern Real Estate Secur. Corp.* v. *Goldstein,* 163 F. 2d 963 (C.A. 2); *Chan Nom Gee* v. *United States,* 57 F. 2d 646 (C.A. 9). There was no question of depriving the petitioner of a trial *de novo.*

There was also no question of improper impeachment of a witness. Indeed, there could be none, for petitioner did not testify in his own case in chief. Also, in distinction from the questions excluded in *Universal Pictures Co.* v. *Harold Lloyd Corporation,* 162 F. 2d 354, 371 (C.A. 9), the questions asked in this case related to testimony petitioner had previously given with respect to the very matter in issue in the suit, *i.e.,* his claim to own the stock.

3. Petitioner urges that there was error in permitting the defendant to prove a conspiracy to "cloak" the ownership of the stock because any such defense had been waived by failing to plead it affirmatively. To this there are two answers. First, under Section 9(a) proof of *beneficial* ownership, and not merely legal title, is a part of a plaintiff's case (*Stoehr* v. *Wallace,* 255 U.S. 239; *Fujino* v. *Clark,* 172 F. 2d 384 (C.A. 9), certiorari denied, 337 U.S. 937), so the question of *bona fides* is sufficiently raised by a denial. Second, as a matter of notice, the pleadings explicitly raised the question whether

the real owner of the shares was the petitioner or Schloemann. The complaint alleged that the shares were vested on a false finding that the shares were owned by Schloemann (P.A. 6). The answer denied that the finding was false (P.A. 9). The complaint also alleged that petitioner owned the shares absolutely, "free and clear of any and all interest, right, or claim thereto or therein, either legal or equitable, on the part of any other person, corporation or other legal entity whatever" (P.A. 5). That, too, was denied. The two denials constituted a clear assertion of the defense that Schloemann was the beneficial owner of the shares which stood in petitioner's name.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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